In the Supreme Court of the United States

OCTOBER TERM, 1977

77-22

No. 77-

RUTH H. BUNN, Executrix of the
Estate of Clair V. Bunn, Deceased,
Petitioner

vs.

CATERPILLAR TRACTOR COMPANY,
a corporation

vs.

ACE DRILLING COAL COMPANY, a corporation and
SOUTH FORK EQUIPMENT COMPANY, INC.,
a corporation

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Cases

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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

The petitioner, RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 6, 1977. (R. 1)[1]

OPINION BELOW

By its Order and without a written Opinion the United States Court of Appeals for the Third Circuit, at No. 76-2083 (unreported), affirmed the judgment of the United States District Court for the Western District of Pennsylvania. Also

[1]References designated by "R." are to pages of the Appendix filed herewith.

by an Order (unreported) the Court of Appeals dismissed plaintiff's timely-filed Petition for Rehearing En Banc on May 4, 1977. The Opinion of the District Court is reported in Volume 415, Federal Supplement, page 286 (June 16, 1976). The Orders of the Court of Appeals and the Opinion of the District Court are set forth in the Appendix. (R. 1 to R. 16)

JURISDICTION

The judgment of the court below was entered on April 6, 1977. (R. 1) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Where the state's Supreme Court, as well as its intermediate appellate and trial courts, have enunciated a basic principle of product liability law for the protection of consumers injured by defective products, and the federal courts have refused to accept and apply that law in diversity cases, is there not a serious conflict between the courts which requires a reversal of the federal appellate court's decision?

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S. C. §1652 (1), Act of June 25, 1948, c. 646, §1, 62 Stat. 869, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

This diversity action is a products liability suit which arises out of the death of Clair V. Bunn on October 11, 1973, in Pennsylvania. (439a)[2] While he was at work on a coal loading dock, a large material moving machine known as a front wheel loader backed over and killed him. (157a, 158a, 168a) The operator did not see Bunn as he proceeded backwards. The machine was designed to move forward and backward at a high speed. (70a) It was manufactured and sold by Caterpillar Tractor Company and was being used for an intended purpose. (9a, 15a, 70a) This action was brought against Caterpillar by Bunn's widow-executrix, on the ground that the wheel loader was defective, because it was not equipped with safety devices which would have prevented the fatal occurrence. (91a-100a) It was sold without a noise device which would activate to give warning of its backward movement (14a-15a, 45a, 213a, 368a); it did not provide the operator with rear-view mirrors, so that he could observe persons located behind the machine (11a-16a, 45a, 329a); and it was so designed that exhaust pipes unnecessarily screened the operator's view to the rear. (215a)

Plaintiff's case, in this diversity action, rested on the state law that a manufacturer-seller is liable in damages if it is established (1) that the product was defective when sold and (2) that the defect was a legal cause of the injury. (404a-405a) Although a plaintiff must establish the existence of a defect, it is improper to require him to prove that the defect caused the whole machine to be unreasonably dangerous.

The trial court submitted a special interrogatory to the jury asking if the wheel loader was 'defective.' (409a) The answer was "no." However, in the Court's instructions, he defined the word "defect" by limiting it to such a defect as

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[2]References designated by "a" are to pages of the Appellant's Appendix in the Third Circuit Court appeal.

would render the product "unreasonably dangerous." (411a-412a, 414a, 416a) The jury's answer determined that the defect in the machine which caused the fatal accident was not of that magnitude. Exceptions to the instructions were duly taken. (31a-32a, 390a, 432a)

In her motion for a new trial, plaintiff complained that the instructions given were in conflict with the substantive law of the state (441a), which does not require that an injured party prove that the *defect* in the product which caused the accident made the product "unreasonably dangerous." In its Opinion refusing to grant a new trial the District Court insisted that to recover the plaintiff must prove that the machine was made unreasonably dangerous by the defect. (R. 7)

On appeal to it, the Circuit Court sustained the judgment of the lower court, without oral argument or written opinion. (R. 1) Plaintiff's motion for a rehearing before the court en banc was likewise denied without opinion. (R. 2)

The cross-claim between Caterpillar and the third-party defendants does not involve the issues raised in this petition.

REASONS FOR GRANTING THE WRIT

I. This Court should reverse the action of a Circuit Court which, in a series of diversity cases (including the present one), has refused to follow the state's substantive law, as set forth by its Supreme Court.

Under state law Petitioner was not required to prove that the defect in the machine made the vehicle unreasonably dangerous, but only that it caused her husband's death. The Third Circuit refused to recognize or apply this law and, as a result, the widow was deprived of recovery for her husband's death.

The defect in the front wheel loader upon which plaintiff based her case was its lack of adequate safety devices to protect persons behind the machine when it traveled in reverse.[3]

Under the state law a product or strict liability action is "governed by the evidentiary standards of warranty law, not by evidentiary standards of negligence law." *Agostino v. Rockwell Manufacturing Co.*, 236 Pa. Superior Ct. 434, 345 A.2d 735, 738 (September 22, 1975). Under this law a manufacturer "is effectively the guarantor of his products' safety." By marketing and advertising the product he "impliedly represents that it is safe for its intended use." He can not "avoid responsibility for damages caused" by a defect in it. *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903, 907 (1974).

In the case of *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), the state adopted the law of strict liability as set forth

[3]There has been no question in this case about the rule that a product which lacks safety devices is defective. *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968); *Capasso v. Minster Machine Co., Inc.*, 532 F.2d 952 (1976). Other cases involving the same or similar defects in heavy construction machinery are: *Pike v. Hough Co.*, 2 C. 3d 465; 85 C. Rptr. 629; 467 P. 2d 229 (Calif., 1970). *Henderson v. Harnischfeger Corp.*, 12 C. 2d 663; 527 P. 2d 353 (1974). *Wirth v. Clark Equipment Co.*, 457 F.2d 1262 (9th Cir., 1972).

in Section 402A, Restatement of the Law (Second) of Torts. This section renders a seller liable for harm to a user of a product which is "in a defective condition, unreasonably dangerous," although "the seller has exercised all possible care in the preparation and sale of his product."

By its later decisions, the state courts substantially modified and altered the law as stated in 402A. They recognized that the true basis for strict liability is a warranty standard and that it is inconsistent to inject any negligence or reasonable man standards in the law's application. The protection of the consumer was broadened by eliminating the requirement that the injured user prove that the defect causing his injury was so serious that it rendered the product "unreasonably dangerous."

The Third Circuit, in the present case, as well as in three other recent decisions,[4] has refused to follow and apply the liberalized law of the state.

The pertinent state law which governs the Petitioner's cause of action has been set forth in the case of *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (May 19, 1975).

In the Opinion it is stated:

> "Strict liability requires, in substance, only two elements of requisite proof: the need to prove that the product was defective, and the need to prove that the defect was a proximate cause of the plaintiff's injuries." (p. 898)
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> • • • • •
>
> "The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on 'reasonableness.' *Cronin*, supra; *Glass*, supra." (p. 900)

[4] *Bair v. American Motors Corp. v. McAden*, 535 F.2d 249 (3rd Cir., 1976); *Greiner v. Volkswagenwerk Aktiengeselleschaft, et al.*, 540 F.2d 85 (3rd Cir., 1976); *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751 (3rd Cir., 1976).

By the *Berkebile* decision (p. 900) this state brought itself into line with the products liability law of California and New Jersey.

> "*Cronin v. J. B. E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 104 Cal. Rptr. 433, 441, 501 P.2d 1153, 1161 (1972); *in accord, Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973)."

The Superior Court of Pennsylvania, an intermediate appellate tribunal, recognizes that *Berkebile* is the law of Pennsylvania and must be followed by lower state courts. It unanimously affirmed (in a per curiam Opinion) the Common Pleas Court's decision in *Azzarello v. Black Bros. Co., Inc.*, et al., 240 Pa. Superior Ct. 756, 359 A.2d (1976). (R. 18, R. 17)

In *Azzarello* the lower court had held[5] that under the *Berkebile* rule a party injured by a defective product is not required to prove that the defect rendered the product "unreasonably dangerous," and that it had committed reversible error in instructing the jury that plaintiff had such a burden. (R. 17)

The Superior Court again recognized the *Berkebile* decision as the governing law in this state, in the case of *Lenkiewicz v. Lange*, et al., 242 Pa. Superior Ct. 87, 363 A.2d 1172 (September 27, 1976).

[5] The lower court Opinion is unreported. It is No. 924 April Term, 1972, Common Pleas Court of Allegheny County, Pennsylvania. Excerpts are included in this Appendix (R. 17) Pending decision of the present case in the Circuit Court, the state Supreme Court allowed an appeal in *Azzarello*. Reargument has not taken place. The Circuit Court was informed of the grant of appeal (R. 19), but did not delay its decision to await the Supreme Court's determination.

The Court said (p. 1175):

> "It is well settled that in order to establish a cause of action for breach of warranty or for strict liability under §402A, the plaintiff must prove that the product was defective at the time that the seller delivered it to the buyer, and that the defect caused the plaintiff's harm. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975)."

In a footnote (p. 1175) the majority Opinion recognizes that *Berkebile* is a decision of the Supreme Court. The footnote is as follows:

> "In *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975), our supreme court held that '[t]he seller must provide with the product every element necessary to make it safe for use.' 462 Pa. at 337 A.2d at 902."

A concurring Opinion was written by Judge Hoffman and he, too, follows and applies *Berkebile*. He said (p. 1177):

> " 'Strict liability [under 402A] requires, in substance, only two elements of requisite proof: the need to prove that the product was defective and the need to prove that the defect was a proximate cause of the plaintiff's injuries.' *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (1975)."
>
> • • • • •
>
> "Thus, it is clear from Pennsylvania case law that the plaintiff in a breach of warranty of (or) §402A case need only prove a prima facie case to reach the jury. *Berkebile v. Brantly Helicopter Corp.*, supra."

In another product liability decision filed July 15, 1976, *Cornell Drilling Co. v. Ford Motor Co.*, 241 Pa. Superior Ct. 129, 359 A.2d 822 (1976), the Superior Court recognized that the trial court had properly applied the product liability law as enunciated in *Berkebile*. It said (p. 825):

> "As correctly observed by the lower court, for appellant to submit his case to the jury on the theory of strict liability under §402A of the Restatement (Second) of Torts (1965), it was necessary to 'prove that the product was defective, and . . . that the defect was a proximate cause of the plaintiff's injuries.' *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 95, ___, 337 A.2d 893, 898 (1975)."

Several years ago the state Supreme Court appointed a committee to draft standard jury instructions. In its Subcommittee Draft of June 6, 1976, it prepared an instruction in which it defined the word "defect" in product liability cases. It said the lack of "any element necessary to make it safe for use or contained any condition that made it unsafe for use, then the product was defective, and the defendant is liable for all harm caused by such defect." (R. 20)[8] In its notes the Subcommittee states that *Berkebile* is the law and that the District Court Opinion in *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268 (E.D. Pa., 1975), does not follow Pennsylvania law; but, instead, it ignores the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 Supreme Ct. 817, 82 L. Ed. 1188 (1938). [Excerpts from the Subcommittee's Draft and Notes are a part of the Appendix. (R. 21)]

The lower state courts have clearly recognized that *Berkebile* is an opinion of the Supreme Court and the law of this state. This is in contradistinction to the Third Circuit's holdings in other cases, that *Berkebile* should be ignored, because a majority of the justices concurred in the decision, but not in the Opinion.

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[8]The draft of proposed instructions has not been officially adopted. They have been followed by the trial courts and cited with approval by the Pennsylvania Superior Court. *Kenworthy v. Burghart*, 241 Pa. Superior Ct. 267, 361 A.2d 335 (1976); *Willinger v. Mercy Cath. Med. Ctr.*, 241 Pa. Superior Ct. 456, 362 A.2d 280, 286 (1976).

II. A decision by the state's Supreme Court, filed subsequent to the Circuit Court's decision, makes it clear that the law applied by the Circuit Court is in conflict with the state law enunciated by the Supreme Court.

The later Supreme Court products liability decision, which confirms that the law as enunciated in *Berkebile* is the law of this state, was filed April 28, 1977 and is *Francioni v. Gibsonia Truck Corp.*, ___ Pa. ___, 372 A.2d 736 (April 1977). While *Berkebile* is not referred to by name, its rule is restated by a unanimous Supreme Court as follows:

> "After a complete review of the record, we find that there is evidence which, if believed, would support a finding that a component part or parts of the steering mechanism of the White truck was defective, that this defect existed at the time the truck left the hands of the lessor and that this defect, in fact, was a legal cause of appellant's injuries."(p. 740)

Francioni ruled that the case is for the jury and it does not place upon plaintiff the burden of proving that the defect rendered the product unreasonably dangerous.

The state Supreme Court in *Berkebile*, as confirmed in *Francioni*, has ruled that a party injured by a product is required to prove only that the product was defective when sold, and that the defect was a legal cause of his injury. In disregard of *Erie R. Co. v. Tompkins*, supra, p. 9, the Third Circuit insists that in diversity cases the injured party has a substantial third burden of proof, namely, to establish that the defect alleged had rendered the article unreasonably dangerous.

Under the present unfortunate conflict of decisions, an injured party's recovery will largely depend upon whether his case is processed in the state or federal court. This Court has ruled, since *Erie*, that such an unjust and undesirable conflict is intolerable. It should not be permitted here. It was

said in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 Supreme Ct. 176, 179, 85 L. Ed. 109 (1940):

> "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

> "The Rules of Decision Act commands federal courts to regard as 'rules of decision' the substantive 'laws' of the appropriate state.....And the Erie R. Co. case decided that 'laws,' in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts." *King v. Order of United Commercial Travelers*, 333 U.S. 153, 68 Supreme Ct. 488, 491, 92 L. Ed. 608 (1948)

The Rules of Decision statute is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. §1652 (1), Act of June 25, 1948, c. 646, §1, 62 Stat. 869.

See also: *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 61 Supreme Ct. 1020, 85 L. Ed. 1477 (1941)

III. The Circuit Court has refused to follow the decisions of this Court which require federal courts, in diversity actions, to follow the law as stated by the lower state courts, if the state's Supreme Court has not spoken on the subject.

Assuming for argument's sake that *Berkebile* is not an opinion of the Supreme Court, and that *Francioni* had not been decided, the law of the state has, nevertheless, been stated in binding form by the decisions of the state's Superior

Court and its trail courts. We refer to *Azzarello*, supra, p. 7; *Lenkiewicz*, supra, p. 7; and *Cornell Drilling*, supra, p. 8. These lower court decisions adopt the principles that were included in *Berkebile*, that a party injured by a defective product is not required to prove that the defect rendered the product unreasonably dangerous, in order to recover for the injuries sustained.

The Pennsylvania Superior Court is the court of final appeal in trespass actions, unless the Supreme Court grants an appeal from its judgment. (Pennsylvania "Appellate Court Jurisdiction Act of 1970," Act of July 31, 1970, P.L. 673; 17 P.S. 211.302) Its statements of substantive law are binding, not only on the state trial courts, but, in the absence of a Supreme Court decision, upon the federal courts.

The conflict in the decisions of the federal and state courts on the matter in issue in this case is clear and definite.

The District Court Judge, in the present case, instructed the jury as follows:

> "Now, the principle applies where the product is, at the time it leaves the seller's hand, in a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him." (412a)
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> • • • • •
>
> "Now, the Plaintiff has the burden of establishing that the defective condition existed and that that defective condition was unreasonably dangerous....." (416a)
>
> In his Opinion (R. 7) refusing a new trial, he said:
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> "'Unreasonably dangerous' is still the law in Pennsylvania in this type litigation, and we believe the Plaintiff here was rightfully held to that burden."

By its affirmance without written opinion, the Circuit Court approved the lower court's decision. (R. 1)

The Third Circuit had said, in *Bair v. American Motors Corp. v. McAden*, supra, fn. p. 6, that it accepts the reasoning

of the *Beron* case, supra, p. 9, and *Berkebile* is "not the law of Pennsylvania." (p. 250) No reference was made to the law as enunciated in the state Superior and the trial court decisions on the subject.

In *Posttape Associates v. Eastman Kodak Co.*, supra., fn. p. 6, the Circuit Court said that the product involved was "defective" but "by no stretch of the imagination could it be considered 'unreasonably dangerous.'" (p. 755) In denying recovery it dismisses *Berkebile* by stating that in it some members of the court "questioned the necessity of proving an 'unreasonably dangerous' condition, despite the language in the Restatement." (p. 754) Again, no reference was made to state Superior or trial court decisions.

In *Greiner v. Volkswagenwerk Aktiengeselleschaft*; supra, fn. p. 6, the Circuit Court said that *Berkebile's* "...weak precedential value does not permit us to find an 'unequivocal rejection' of the unreasonably dangerous concept in Pennsylvania." (Citing: *Bair, supra and Beron*, supra) (p. 95).

This court said in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 61 Supreme Ct. 179, 85 L. Ed. 139 (1940), that the object of the Judiciary Act of 1789 "..... to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts....would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." (p. 183)

It then ruled that a federal court "is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable." The Court continued by stating that it is the duty of the federal court "in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule...." (p. 183)

The Court, speaking through Mr. Justice Stone (later Chief Justice), continued:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (p. 183)

This same rule has been applied in numerous other decisions.[7]

The issue in conflict is of major importance in the expanding field of product liability litigation. The Circuit's obstinate refusal to acknowledge *Berkebile* as state law, or to recognize the law set forth in the decisions of the state's intermediate and lower tribunals, has resulted in a situation where an injured party's right of action and recovery depend upon whether his case is tried in the state or in the federal court.

Only this Court can remedy this unjust and extremely undesirable situation, which is of vital importance, not only to the Bunn widow, but to many persons with product liability actions whose cases may be processed in the federal court.

By the Circuit Court's offering defendants in diversity product liability cases a substantial additional opportunity of success, a resulting transfer of such cases from the state to the district courts in increasing their case load burden.

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[7] *Fidelity Union Trust Co. v. Field*, supra, p. 14; *Six Companies of California v. Joint Highway District*, 311 U.S. 180, 61 S.Ct. 186, 85 L. Ed. 114 (1940) and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 61 Supreme Ct. 336, 85 L.Ed. 284 (1940).

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2083

RUTH H. BUNN, Executrix, Estate of
Claire V. Bunn, Deceased,
Appellant

v.

CATERPILLAR TRACTOR CO., a corporation
deft & 3rd pty plf.

v.

ACE DRILLING COAL CO., a corp.
SOUTH FORK EQUIPMENT COMPANY, INC. a corp.
3rd pty defts.

(D. C. Civil No. 74-637)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) April 1, 1977
Before VAN DUSEN, GIBBONS and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court:

VAN DUSEN
Circuit Judge

Dated: April 6, 1977

Attest:

THOMAS F. QUINN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2083

(D. C. Civil No. 74-637)

RUTH H. BUNN, Executrix, Estate of
Clair V. Bunn, Deceased,
Appellant

v.

CATERPILLAR TRACTOR CO., a corporation
deft & 3rd pty plf.

v.

ACE DRILLING COAL CO., a corp.
SOUTH FORK EQUIPMENT COMPANY, INC. a corp.
3rd pty defts.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

VAN DUSEN
Judge

Dated: May 4, 1977

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,
Plaintiff

v.

CATERPILLAR TRACTOR COMPANY, a corporation,
Defendant

v.

ACE DRILLING COAL COMPANY, a corporation,
Third Party Defendant

Civil Action No. 74-637

OPINION

SNYDER, *J.*

Presently before the Court is Plaintiff's Motion for New Trial for alleged errors which occurred during the Trial and in the Court's Charge. The Motion will be denied.

I. BACKGROUND.

This action arises out of a claim for damages for the death of Clair V. Bunn on October 11, 1973. Bunn, a supervisor for Ace Drilling Company (Ace), was directing coal loading operations at Ace's Lilly Loading Dock when he was run over by a Caterpillar 988 Front Wheel Loader, manufactured by the Defendant, Caterpillar Tractor Company (Caterpillar). The machine was originally sold to Cecil I. Walker Company of West Virginia on January 28, 1969, but at the time of the accident it was owned by South Fork Equipment Company, who had leased it to Ace.

Ruth H. Bunn, wife of the deceased, brought this action alleging that the 988 was defectively designed at the time it

was sold by Caterpillar since it was not equipped with adequate safety devices (specifically, rear view mirrors and a backup alarm) and the exhaust pipe and air precleaner mounted behind the driver's seat obstructed the view of the driver to the rear.

The case was tried before a jury which answered the first special interrogatory[1] as follows:

"1. Was the Caterpillar 988 Wheel Load in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, on January 28, 1969?

ANSWER 'YES' OR 'NO': NO"

[1]The Special Verdict Slip submitted to the jury read as follows:

"1. Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, on January 28, 1969?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 1 IS 'YES', ANSWER QUESTION NO. 2. IF YOUR ANSWER TO QUESTION NO. 1 IS 'NO', SIGN THE NEXT PAGE AND RETURN THIS DOCUMENT TO THE COURT.

2. Was that defective condition a proximate cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 2 IS 'YES', ANSWER QUESTION NO. 3. IF YOUR ANSWER TO QUESTION NO. 2 IS 'NO', SIGN THE NEXT PAGE AND RETURN THIS DOCUMENT TO THE COURT.

3. Did Clair V. Bunn voluntarily and intentionally assume the risk of a known danger which brought about his injury and death on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 3 IS 'YES', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT. IF YOUR ANSWER TO QUESTION NO. 3 IS 'NO', ANSWER QUESTION NO. 4.

4. Was Ace Drilling Coal Company negligent at the time of the accident on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

(continued)

I. DISCUSSION

A. The "Berkebile" Contention

Plaintiff contends that this Court erred in not using the language of the Pennsylvania Supreme Court in *Berkebile v. Brantly Helicopter Corp.*, ___ Pa. ___, 337 A.2d 893 (1975), deleting "unreasonably dangerous" from Section 402A.[2] Plaintiff contends that decision, written by two Justices and in which three other Justices concurred with the result only, and two other Justices filed separate concurring opinions, changed the Pennsylvania law on 402A so that a plaintiff need not prove a defective product was unreasonably dangerous.

This Court charged the jury as follows:

"Now, the principle applies where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer which would be *unreasonably dangerous* to him." (T. 80)

* * * * *

IF YOUR ANSWER TO QUESTION NO. 4 IS 'YES', ANSWER QUESTION NO. 5. IF YOUR ANSWER TO QUESTION NO. 4 IS 'NO', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT.

5. Was the negligence of Ace Drilling Coal Company a proximate cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 5 IS 'YES', ANSWER QUESTION NO. 6. IF YOUR ANSWER TO QUESTION NO. 5 IS 'NO', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT.

6. Was the negligence of Ace Drilling Coal Company a superceding cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____."

[2]See "Defective Standard of Section 402A of Restatement (Second) Torts Questioned. *Berkebile v. Brantley Helicopter Corp.*, ___ Pa. ___, 337 A.2d 893 (1975)", 80 Dick. L. Rev. p. 633 (1976).

"Now, the whole matter of defective condition arises when you can find either by design or manufacture — and there is no evidence about manufacturing defects in this case — that the product itself was designed in a way to make it *unreasonably dangerous* to the user or consumer." (T. 82)

• • • • •

"Again, to summarize, by defective condition we mean a condition not contemplated by the ultimate user and which condition is *unreasonably dangerous* to him and which presents a hazard...." (T. 82)

• • • • •

"Now, the Plaintiff has the burden of establishing that the defective condition existed and that that defective condition was *unreasonably dangerous*...." (T. 84)

At the hearing on this Motion, Plaintiff's counsel strenuously argued that this Court deliberately ignored Pennsylvania law as expressed in *Berkebile* by holding the Plaintiff to the burden of proving that this 988 Wheel Loader was unreasonably dangerous to the user or consumer.

This Court followed the lead of Judge Daniel H. Huyett, III in *Beron v. Kramer-Trenton Co.*, 402 F.Supp. 1268 (E.D.Pa. 1975), in which he stated (at p. 1277):

"... the views expressed in Chief Justice Jones' opinion in *Berkebile* are not the law of Pennsylvania, and that it is proper to instruct a jury that it must find a defective condition be unreasonably dangerous to the user or consumer."

The Third Circuit approved that decision in *Bair v. American Motors Corporation* (D.C. Civil No. 68-166, decided May 17, 1976) (Slip Opinion, p. 2), stating:

"Commonwealth v. Little, 432 Pa. 256, 248 A.2d 32 (1968), declined to follow a prior opinion representing the views of only two justices; the Supreme Court of Pennsylvania there reasoned that an opinion 'joined by only one other member of this Court has no binding precedential value.' *Ibid.* at 260, 248 A.2d at 35. Applying the rationale of *Little* to the *Berkebile* situation, we are constrained to accept the reasoning set forth [in the Beron case, supra.]..."

"Unreasonably dangerous" is still the law in Pennsylvania in this type of litigation, and we believe the Plaintiff here was rightfully held to that burden.

B. The Points For Charge

Plaintiff contends that the Court should have approved the following Points for Charge which were submitted:

"3) The defendant manufacturer-seller is required to provide every element necessary to make its product safe for use."

"4) The defendant manufacturer-seller is effectively the guarantor of the safety of its product."

"5) If the Caterpillar 988 Loader, at the time it was sold, did not contain adequate safety devices for the protection of persons working around the machine, the jury must find that the product was defective."

"10) The plaintiff Executrix is entitled to recover against defendant Caterpillar if she shows sufficient facts to allow the jury to infer that the Caterpillar 988 Loader was not equipped *with adequate safety devices* at the time it was sold by Caterpillar, and that this was a substantial factor in producing Clair V. Bunn's fatal injuries."

The Restatement 2d of Torts, §402A, adopted in Pennsylvania in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), reads:

"One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer...."

Plaintiff's Points 3 and 10 ignore the fact that the test to determine liability of the seller is not whether the product is safe, but rather, according to 402A, whether it is "unreasonably dangerous". Point 4, although it follows the language in *Salvatore v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974), is taken out of context and if read to the jury as submitted by the Plaintiff, would fail to properly instruct the jury that the product must be sold "in a defective condition" for the seller to be liable. *Restatement of Torts* §402A. Point 5 also fails to instruct the jury that the lack of adequate safety devices must be such that the machine must be "unreasonably dangerous" for the seller to be liable for its defect.

C. The Definition of "Unreasonably Dangerous"

Plaintiff objects to the inclusion of the language defining defective condition in terms of "unreasonably dangerous" in the Court's Charge to the jury. In speaking of defective condition, the Court charged as follows (T. 82):

> "Now, the whole matter of defective condition arises when you can find either by design or manufacture — and there is no evidence about manufacturing defects in this case — that the product itself was designed in a way to make it *unreasonably dangerous* to the user or consumer. And counsel has stated to you, and correctly so, that the lack of a proper safety device can, if you so find, constitute a design defect, but it is for you to say whether or not the Plaintiff has in fact established by a fair preponderance of the evidence that there was a designed defect on those particular aspects alleged in the claim in this case. Again, to summarize, by defective condition *we mean a condition not contemplated by the ultimate user and which condition is unreasonably dangerous to him* and which presents a hazard beyond that which would be contemplated by the ordinary consumer who purchases it and with the ordinary

> knowledge common to the user community as to its characteristics. . . ."

Plaintiff contends that this language is the kind that "rings in negligence" and is therefore inappropriate in strict liability cases. We direct Plaintiff's attention to the language in *Beron v. Kramer-Trenton Company, supra* (at pp. 1273-1274):

> "...First, an examination of Pennsylvania appellate decisions interpreting §402A reveals that the text and the comments, including in particular comments g, h and i, have been solidly engrafted into Pennsylvania law without reservation. In the absence of an unequivocal rejection of any specific aspect of §402A by a majority of the Pennsylvania Supreme Court we hesitate to impute such an intention to that Court, sitting as we do in our capacity as a federal diversity court interpreting Pennsylvania law. Second, we believe that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing it from 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of 'defective condition.' In our view the inclusion of 'unreasonably dangerous' serves two overlapping functions in the §402A formulation of strict liability. We believe it denotes that the draftsmen of the Restatement intend to foreclose the possibility that 'defective condition' might be construed to include any characteristic of a product capable of inflicting injury. In addition, is[sic] signifies that jurors should not resort to their intuitive understanding of 'defective condition' but rather that they should be guided by an objective standard based on community expectations of product safety." [Error in original] [Footnote omitted]

The language used in the Charge was given in an effort to provide the jury with an objective criteria for determining "defective condition" and is correct.

D. The Expert Testimony

At the trial, Plaintiff offered to have her expert witness testify that he had seen and had photographs of a Caterpillar 988 Front Wheel Loader with the air precleaner and exhaust pipe mounted in the manner which he recommended to reduce the blind spots. The offer was refused and Plaintiff now contends that evidence would show the feasibility of the design changes recommended.

As stated in *Bowman v. General Motors Corporation*,64 F.R.D. 62 (E.D.Pa. 1974) (at p. 70):

> "...Evidence of subsequent design modifications and indeed even post-accident precautions are admissible: (1) to refute the position that the existing condition was incapable of improvement, or to demonstrate that precautions were feasible before the injury; or (2) to show that the defendant knew or should have known of a reasonably foreseeable danger yet failed to give notice thereof."

See also, Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352 (8th Cir. 1975).

This Court excluded Plaintiff's offer because the offer as given *was not relevant to the issue of the feasibility of the design changes*. There was nothing in the offer to show that the changes in the 988 seen by the expert or on the 988 in the photo *were either functionally or economically feasible*. There was nothing to show whether or not the changes were a result of a special order to perform a particular function or to show that they even worked.

The predicate to the admissibility of such evidence would have been the circumstances under which the changes in the 988 observed had been brought about. In the absence of such proof, *the offer was irrelevant*.

E. Restrictions On Treatises

The Plaintiff offered to read into evidence various articles (including one by the National Safety Council and one by a Safety Engineer from General Dynamics) which it's expert, Dr. Purkupile, stated he consulted in formulating his opinion. After examining the articles and conferring with counsel, this Court allowed the Plaintiff to read relevant portions of those articles to the jury. Plaintiff now contends that this Court erred in not allowing the reading of the lengthy articles in their entirety to the jury.

The Court exercised its authority under Rule 403 of the Federal Rules of Evidence[3] in limiting the relevant evidence as contained in the lengthy treatises. To have allowed more would have unnecessarily bogged down the trial with repetitious, time-wasting testimony.

F. The Use Of Regulations

Plaintiff was allowed to read to the jury relevant portions of the Manual of the Corps of Engineers, United States Army, entitled, "General Safety Requirements". In addition, Plaintiff read into evidence certain regulations of the Occupational Safety and Health Administration and the Mining Enforcement and Safety Adminstration relating to pertinent safety devices on machinery such as a wheel loader. The argument is now made that this Court completely negated the effect of these regulations by its Charge to the jury.

Specifically, the Court stated (T. 81-82):

> "You are particularly cautioned to recall that the Court instructed you with respect to various rules and regulations requiring back-up mirrors and audible signaling devices. These rules and regulations were not

[3] "Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

to be considered as imposing a legislative standard of conduct upon any one other than the user or consumer, which in this case is Ace.

Within the facts of this case, the Plaintiff contends that the product, the 988 Caterpillar, was *unreasonably dangerous* when it left the hands of Caterpillar, and this is a question of fact for you to determine as to Caterpillar without regard to these safety rules and regulations except as you may decide they determine a standard of conduct and which you would then apply to the manufacturer. *They do not apply to the manufacturer under the persons to whom the rules and regulations were issued.* And as I said, I think you realize when I talk about the consumer or user I am referring to Ace Drilling Company and its employees, including Mr. Bunn."

In accordance with that Charge, this Court approved Defendant's Points for Charge Nos. 6 and 7:

"6. You have heard the testimony in this case about OSHA and MESA regulations. I instruct you that those regulations do not apply to Caterpillar Tractor Company and Caterpillar Tractor Company was not under any obligation to obey those regulations."

"7. You have heard the testimony in this case about a regulation of the United States Corps of Army Engineers. I instruct you that the regulation does not apply to Caterpillar Tractor Company in this case."

This Court agrees with the Plaintiff's contention that safety codes are admissible in evidence to support a claim that a given design is hazardous, even though the codes have no binding effect on the Defendant. However, *the purpose to which they may be put in a 402A strict liability case is not as clear.*

In *Smith v. Hobart Manufacturing Co.*, 191 F.Supp. 530 (E.D. Pa. 1961) [reversed and remanded on other grounds, 302 F.2d 570 (3d Circ. 1962)], the plaintiff brought suit against the manufacturer of a meat grinder for alleged negligence in not designing a machine to include known safety devices. There, the plaintiff introduced into evidence the General Safety Law (43 P.S. §§25-1 through 25-15) and the Regulations of the Department of Labor and Industry which provided safety standards to be followed in places of employment in Pennsylvania. The defendant there objected to the use of the Safety Law and the Regulations, claiming that they did not apply to the manufacturer but to the employers. At the trial, the judge instructed the jury (at p. 532):

"...that they could consider the Safety Law and the Regulations of the Department of Labor and Industry *as a factor* in their deliberations when they were deciding whether the design of the Hobart grinder was reasonably safe...."[Emphasis supplied]

The jury was instructed as to all the other elements of the law of negligence and not merely that if they found a violation of the Law and Regulations, the defendant would be liable.

As the Court stated in reviewing the trial (at p. 533):

"...this was an ordinary negligence action in which the General Safety Law and the Regulations were before the jury as evidence of the considered judgment of the Commonwealth of Pennsylvania as to the safety features of the design necessary to make a meat grinder a reasonably safe machine."

The action *sub judice* is admittedly not one of negligence, but is one claiming 402A strict liability. The jury in this case was not determining the Defendant's negligence but rather, in accordance with Comment i of the Restatement, they had to determine if the Defendant was strictly liable for selling a defectively designed machine. The juries in both cases, however, could consider Regulations which

set forth safety standards for people other than defendants. The juries in both cases had to reach a conclusion as to whether the machines in their respective cases were "*reasonably safe*" or "*unreasonably dangerous*". In both cases, they were allowed to used the Regulations *as a factor* in their ultimate decisions.

In a similar case involving the same Department of Labor and Industry Regulations [*Green v. Sanitary Scale Company*, 296 F.Supp. 625 (E.D.Pa. 1969), vacated and remanded on other grounds, 431 F.2d 371 (3d Cir. 1970)], the trial judge instructed the jury as follows (at p. 628);

> "...you may consider whether the defendant should have followed these standards or ones similar to them when they designed their meat grinder...."

Citing *Smith, supra*, the Court explained the charge by stating (at p. 629):

> "... Since the defendant was charged in the complaint, *inter alia*, with negligent design of the meat grinding machine, the plaintiff was entitled to rely on any competent evidence tending to establish the minimum acceptable standard of design and construction. The aforementioned regulation clearly is relevant in this regard, provided that proper limiting instructions are given to the jury."

The Regulations in both the *Smith* and *Green* cases were used to determine an "acceptable standard of design" and to use this standard to decide either "lack of due care" or "*unreasonably dangerous*" is a distinction without a difference.

The instructions given by this Court when taken as a whole made clear to the jury that the Regulations *could be used* to set up a standard if they so decided to use it, and it properly instructed them that the Regulations were *not* to be considered as *binding* upon the Defendant.

C. The Unread Point

The Plaintiff's final contention that this Court erred in approving Defendant's Point for Charge No. 16 is without merit since there is no showing in the record that the Point was ever read to the jury. Therefore, regardless of the propriety of that Point, it does not constitute ground for a new trial since the jury was not exposed to it.

The other contentions raised in the Plaintiff's Motion but not argued, are without merit.

An appropriate Order will be entered denying the Motion.

...../s/ DANIEL J. SNYDER, JR.....
United States District Judge

Dated: June 16, 1976

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,
Plaintiff

v.

CATERPILLAR TRACTOR COMPANY, a corporation,
Defendant

v.

ACE DRILLING COAL COMPANY, a corporation,
Third Party Defendant

Civil Action No. 74-637

ORDER

AND NOW, to-wit, this 16th day of June, 1976, after due consideration of the arguments and briefs of counsel and for the reasons set forth in the Opinion filed simultaneously herewith;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion of the Plaintiff Ruth H. Bunn for New Trial be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion of the Defendant Caterpillar Tractor Company under Federal Rule of Civil Procedure 60 be and the same is hereby denied.

..../s/ DANIEL J. SNYDER, JR....
United States District Judge

EXCERPTS FROM OPINION

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. CIVIL DIVISION

ORCA C. AZZARELLO,
Plaintiff

vs.

THE BLACK BROTHERS CO., INC., a corporation,
Defendant,

vs.

PARTS PROCESSING, INC., a corporation,
Additional Defendant

No. 924 April Term, 1972. In Trespass

(Filed December 10, 1975.)

BEFORE: DOYLE, LOUIK and G. ROSS, *JJ.*

OPINION

G. ROSS, *J.*

.....

Clearly, the *Berkebile* case precludes the inclusion of the phrase "unreasonably dangerous" when referring to what a plaintiff must establish in a §402A action. Although, as Black Brothers argues, *Berkebile* may not be a "majority" opinion, we must still apply its precepts to the instant controversy.

An examination of the court's charge indicates that the phrase "unreasonably dangerous" was frequently mentioned and appears in the transcript as follows:

.....

Therefore, plaintiffs are not precluded from presently asserting the *Berkebile* decision. As indicated heretofore, the

phrase "unreasonably dangerous" appeared frequently in the charge of the trial court, and it cannot be and it has not been asserted that said phrase was an insignificant factor in the deliberations of the jury. Consequently, on the basis of the foregoing, it is the conclusion of this Court, that the plaintiff must be granted a new trial to correct the erroneous charge below. Accordingly, an Order will be entered reflecting this conclusion.

.....

Order of the Superior Court of Pennsylvania affirming Azzarello v. Black Bros., et al.

ORCA C. AZZARELLO

v.

BLACK BROTHERS COMPANY, INC.,
Appellant

v.

PARTS PROCESSING, INC.

Superior Court of Pennsylvania

Argued April 15, 1976.

Decided July 19, 1976.

Appeal No. 401 April Term, 1976, from the Order of the Court of Common Pleas, Civil Division, of Allegheny County, at No. 924 April Term, 1972; Robert A. Doyle, Trial Judge, Maurice Louik and George H. Ross, Judges.

.....

Before WATKINS, President Judge, and JACOBS, HOFFMAN, CERCONE, PRICE, VAN der VOORT and SPAETH, *JJ*.

PER CURIAM:

Order affirmed.

THOMAS D. THOMSON
JOHN DAVID RHODES
ROBERT S. GRIGSBY
NORMAN J. COWIE
HERBERT GRIGSBY
GILES J. GACA
JOHN R. WALTERS, JR.
RALPH A. DAVIES
JANET N. VALENTINE
RICHARD E. RUSH
JOHN W. JORDAN IV
THOMAS A. MATIS
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BRANCH OFFICES
W. MIFFLIN, PA
MARS, PA

March 21, 1977

Re: Bunn vs. Caterpillar Tractor Co., et al.
No. 76-2083. Our File No. 9667-74.

T. F. Quinn, Esquire, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Mr. Quinn:

This office represents appellee Caterpillar Tractor Co. in the above appeal.

.....

This is to advise that we have just learned that the Pennsylvania Supreme Court granted allocatur in the *Azzarello* case on February 9, 1977 and that an appeal has been entered in the Pennsylvania Supreme Court at No. 105 March Term, 1977.

.....

Thank you very much for your courtesy and cooperation.

Very truly yours,

Robert S. Grigsby

EXCERPTS FROM PENNSYLVANIA STANDARD JURY INSTRUCTIONS

8.01 (Civ) GENERAL RULE OF STRICT LIABILITY

The _____ of a product is [liable] [subject to liability] for the injuries caused to the plaintiff by a defect in the article which existed when the product left the possession of the _____. Such liability is imposed even if the _____ has exercised all possible care in the preparation and sale of the product.

8.02 (Civ) DEFINITION OF "DEFECT"

The _____ of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for use, and without any condition that makes it unsafe for use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for use or contained any condition that made it unsafe for use, then the product was defective, and the defendant is liable for all harm caused by such defect.

EXCERPTS FROM THE SUBCOMMITTEE'S NOTES

. . . . . .

Elimination of the unreasonably dangerous qualification for cases arising under Section 402A was challenged and rejected in *Beron v. Kramer Trenton Co.*, 402 F. Supp. 1268 (E.D.Pa. 1975) which declined to follow the Pennsylvania Supreme Court's decision in *Berkebile, supra.*[1] *Beron* does not address itself directly to the policy determinations in *Berkebile* of closing to the jury all considerations of negligence in Section 402A actions, nor does it examine the reasoning of *Cronin v. J. B. E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 43 501 P.2d 1153 (1972), or *Glass v. Ford Motor Company*, 123 N.J. Super. 599, 304 A.2d 362 (1973), cases cited by *Berkebile* in which the unreasonably dangerous requirement was similarly deleted in product liability cases.

. . . . . .

Berkebile was decided before all the justices of the Pennsylvania Supreme Court and no dissent was filed.

. . . . . .

All cases prior to *Berkebile* which are inconsistent with its expression of the law under Section 402A are clearly inapposite.

. . . . . .

---

[1] *Beron* narrowly held that under Pennsylvania law less than majority opinions, such as *Berkebile*, were entitled to no precedential weight. This holding totally ignores the philosophy expressed in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938); *accord, Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L.Ed. 9 (1943).